IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. S32684
Airman First Class (E-3) MELLODEE L. BEHUNIN, USAF *Appellant*	)	USCA Dkt. No. 22-0276/AF

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED[1]:

I.

WHETHER EXTRA-RECORD RESULTS OF OTHER COURTS-MARTIAL THAT WERE NOT PART OF THE RECORD OF TRIAL BEFORE APPELLANT'S CASE WAS DOCKETED AT THE CCA MAY BE CONSIDERED DURING ITS ARTICLE 66, UCMJ, REVIEW.

[1] This Court's Order Granting Review, dated 2 November 2022, lists the issues in this case in the opposite order that Appellant addresses the issues in her brief. The United States will continue Appellant's numbering scheme for ease of argument and review by this Court, so that it is clear which issues are being addressed. Thus, the numbering of the issues presented in this brief is the opposite of their numbering in the granting order.

II.

APPELLANT AND CM FACED SEPARATE COURTS-MARTIAL FOR, *INTER ALIA*, JOINT USE OF CONTROLLED SUBSTANCES. UNLIKE APPELLANT, CM RECEIVED NO CONFINEMENT OR PUNITIVE DISCHARGE FOR ESSENTIALLY THE SAME MISCONDUCT. DID THE AIR FORCE COURT MISAPPLY *UNITED STATES v. LACY,* 50 M.J. 286 (C.A.A.F. 1999) WHEN IT HELD THAT CM'S AND APPELLANT'S CASES WERE NOT CLOSELY-RELATED CASES WHOSE SENTENCES REQUIRED COMPARISON?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2019). This Court has jurisdiction to review the above-captioned case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case (App. Br. at 2-3) and provides the following supplement. On 14 February 2022, Appellant moved to attach to the Entries of Judgment for the courts-martial of MS and CM, and an internet printout of the court-martial result for SM. (JA 186-7). On 18 February 2022, the United States opposed Appellant's Motion to Attach. (Id.) In its opposition, the United States asserted that since the issues of co-actors'

sentences and sentence disparity were not raised in the record, under Article 66, UCMJ, the CCA could not consider the requested documents in order to resolve Appellant's sentence appropriateness assignment of error. (Id.) AFCCA granted Appellant's motion on 22 February 2022, but deferred consideration of the attachment pursuant to the holding in United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020). (Id.)

STATEMENT OF FACTS

1. Appellant's Drug Use, Fraudulent Enlistment, and False Official Statement to Military Investigators

Appellant fraudulently enlisted in the Air Force when she signed her Air Force Form 2030 on 18 April 2018, stating she never experimented with, used, or possessed any illegal drug or narcotic. (JA at 55.) However, Appellant consumed cocaine prior to entering the Air Force. (Id.) A little less than a year after fraudulently enlisting in the Air Force, Appellant became the alternate Drug Testing Program Trusted Agent for her unit and received the training necessary to notify those selected for testing. (Id.)

Appellant told other airmen that she used the money she earned from her high school job on cocaine and that she had used prior to joining the military. (JA at 56.) One of the airmen she told she previously used cocaine was MS. (Id.)

Around May 2020, Appellant, MS, CM, and SM discussed using lysergic acid diethylamide (LSD) at SM's apartment. (Id.) At that point in time, Appellant

only knew CM and MS for approximately one to two months. (Id.) Over a three-day weekend, 22-26 May 2020, Appellant went to CM's apartment with SM, CM, MS, and one other airman. (Id.) CM offered the others LSD. (Id.) When MS expressed reservations about using LSD because she had her Career Development Course exams on Tuesday after the party, Appellant and SM tried to convince her to use it anyway, and she did. (Id.) When called as a witness at Appellant's court-martial, MS stated she expressed reservations about going to CM's apartment – where they were going to use LSD. (JA at 130.) Appellant also used the LSD available at CM's apartment. (JA at 56.) Appellant and the other three Airmen talked publicly at a pool party with other members present about their use of LSD. (Id.)

When MS informed Appellant she wanted to use cocaine, Appellant described the effects of cocaine to her as making you happier and stated she also wanted to use cocaine. (Id.) Appellant spearheaded the effort to obtain cocaine through CM after MS asked her about obtaining and using cocaine. (JA at 132.) In June 2020, a couple of weeks after their LSD use, Appellant and the other three Airmen sought to procure and use cocaine. (JA at 56.) They drove together to an ATM to obtain cash, then paid thirty-five dollars per person for the cocaine. After obtaining the cocaine, Appellant proceeded to MS's apartment where a party with both civilians and military members was underway. (Id.) During the party,

Appellant went into MS' bedroom with CM, MS and SM. (JA at 57.) Appellant tested the cocaine by rubbing it on her gums. Following Appellant's lead, all four snorted their portions of the cocaine. (Id.) Appellant did two "lines" of cocaine by herself. (JA at 117.)

MS' roommate reported Appellant and her friends for potentially using drugs at the party. Military investigators later interviewed Appellant. (Id.) During her interview, Appellant confessed to using cocaine in June, but stated she never consumed cocaine prior to June 2020. (Id.) She tested positive for cocaine at thirty-eight times the Department of Defense cutoff limit of 100 ng/mL. (Id.)

2. Appellant's Plea, Care Inquiry, and Sentencing

Appellant entered into a plea agreement with the convening authority, in which she agreed to plead guilty at a special court-martial to one specification of fraudulent enlistment in violation of Article 83, UCMJ; one specification of false official statement in violation of Article 107, UCMJ; and one specification of wrongful use of cocaine and one specification of wrongful use of LSD in violation of Article 112a, UCMJ. (JA at 76.) Appellant also agreed to waive her right to be tried by members. (Id.) In exchange for her plea of guilty, Appellant and the convening authority agreed to a maximum confinement of five months for each specification, with the confinement to run concurrently. (JA at 77.) Appellant agreed to a minimum confinement of two months for the fraudulent enlistment and

two months for each specification of wrongful use of a controlled substance, all to run concurrently. (Id.)

During her providence inquiry, Appellant admitted to each of the offenses; however, she attempted to mitigate her conduct for every offense. Specifically, for fraudulent enlistment, she stated she told her recruiter about her drug use, and he told her to deny it on her Air Force Form 2030. (JA at 85-86). She stated when she lied to military investigators, she was again thinking about what her recruiter told her. (JA at 100.) As for her drug use, Appellant stated she was the one peer-pressured into using cocaine and LSD. (JA at 113 and 124.)

When trial counsel called the Air Force recruiter to testify in the presentencing proceedings, his testimony contradicted Appellant's assertion that he told her to lie on her Air Force Form 2030 and Appellant's claim that he knew of her preservice drug use. (JA at 151-2.)

Appellant's sentencing case consisted of two character letters, two letters of appreciation, Appellant's squadron "professional of the month" recognition, family photos, and the testimony of her mother. Appellant provided oral and written unsworn statements in which she stated her stepfather made sexual advances towards her, which contributed to her preservice cocaine use. (JA at 74.) Although called to testify, Appellant's mother did not testify to that abuse, and the defense did not otherwise corroborate Appellant's unsworn statements.

3. CM's Entry of Judgment

On 18 February 2021, a special court-martial consisting of officer members convicted CM, consistent with his pleas, of one charge of fraudulent enlistment in violation of Article 83, UCMJ[2]; one charge of false official statement in violation of Article 107, UCMJ; one charge with two specifications for use and distribution of cocaine in violation of Article 112a, UCMJ; and one charge with two specifications for use and distribution of LSD. (JA at 188-9.) The members sentenced CM to forfeiture of $500 pay per month for three months, reduction in grade to E-1, and hard labor without confinement for three months.

4. CCA's Determination that Appellant's and CM's cases were not closely related.

The CCA found the circumstances around Appellant's and CM's convictions for their individual Article 112a, UCMJ, violations suggested a common or parallel scheme under United States v. Lacy, 50 M.J. 286, 287 (C.A.A.F. 1997). (JA at 14.) However, the CCA also considered that Appellant and CM received standalone convictions for fraudulent enlistment based on nondisclosure of preservice drug use and making false official statements to military investigators with the intent to deceive. (JA at 15.) The CCA ultimately declined to find a

[2] References to Article 83, UCMJ, are to the Manual for Courts-Martial, United States (2016 ed.) [hereinafter "2016 MCM"]. Otherwise, all references to the UCMJ are to the Manual for Courts-Martial, United States (2019 ed.) [hereinafter "2019 MCM"].

"nexus where the common link is that two Airmen independently violated the same article of the UCMJ and harbored a similar purpose when they separately committed the misconduct at issue." (JA at 15.) They found that the types of offenses and the manner committed only established a mere similarity between the offenses, but did not satisfy the required showing of nexus. (Id.) Therefore, "two of the four convictions involve neither co-actors collaborating in the commission of a crime, Airmen involved in a scheme to deceive military officials, or other direct nexus." (JA at 15.)

In coming to this conclusion, the CCA relied on the standard found in Lacy – "Cases are 'closely related' when, for example, they include 'coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." (JA. at 15 (*citing* Lacy, 50 M.J. at 288).)

SUMMARY OF THE ARGUMENT

The plain meaning of Article 66, UCMJ, and this Court's decision in Jessie lead to the conclusion that a CCA cannot consider extra-record results of courts-martial not attached to the record at the time the CCA dockets the case.

This Court should find the principles of *stare decisis* support prohibiting the use extra-record materials for the purpose of sentence comparison. This Court's decades-old precedent regarding sentence comparison is both poorly reasoned and

unworkable in practice. The precedent strays far from the plain language of Article 66, and a thorough and fair comparison between sentences would require the CCAs to compare entire records of trial, rather than incomplete and potentially misleading materials attached haphazardly after docketing with the CCA. Prohibiting consideration of extra-record materials during Article 66 sentence appropriateness review will not upset the expectations of servicemembers – who will still be entitled to the CCA's determination that their sentence *should* be approved – and will bolster public confidence through the faithful application of the plain meaning of Article 66, UCMJ.

Even if this Court considers extra-record material in this case, the CCA's holding that Appellant's and CM's cases are not closely related within the standard set forth by United States v. Lacy was not an abuse of discretion, because they were not coactors involved in a common crime for *all* convicted offenses, nor were CM and Appellant involved in a common or parallel scheme for *all* convicted offenses, nor does there exist any other direct nexus between the servicemembers for *all* convicted offenses. Appellant chose to fraudulently enlist in the Air Force by lying about her drug use before she ever met CM. Furthermore, Appellant did not act in concert with CM to lie to law enforcement, but separately made the decision to lie in an attempt to escape culpability.

Regardless of whether AFCCA misapplied Lacy, sentence comparison is but one aspect of a sentence appropriateness review under Article 66, UCMJ, and the CCA conducted a full and complete and individualized sentence appropriateness review of Appellant's case. It also did, in fact, conduct a comparison between Appellant and CM's cases. In doing so, the Court properly exercised its authority under Article 66, UCMJ, and found based on the record of trial Appellant's sentence was appropriate.

ARGUMENT

I.

EXTRA-RECORD RESULTS OF OTHER COURTS-MARTIAL THAT WERE NOT PART OF THE RECORD OF TRIAL BEFORE APPELLANT'S CASE WAS DOCKETED AT THE CCA MAY NOT BE CONSIDERED DURING THE CCA'S ARTICLE 66, UCMJ, REVIEW.

Standard of Review

"The scope and meaning of Article 66[] is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted).

Law

The CCA "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (Article 60c)." Article 66(d), UCMJ.

Similarly, Article 67(c)(1), UCMJ, states "the Court of Appeals for the Armed Forces may only act with respect to the findings and sentence set forth in the entry of judgment, affirmed or set aside as incorrect in law" by the CCA. Article 67(c)(1), UCMJ. When reviewing sentences, a service court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, *on the basis of the entire record*, should be approved." Article 66(d), UCMJ.[3] (emphasis added).

Despite the plain language of the statutes, this Court's prior precedent allowed CCAs to consider matters entirely outside the record with respect to sentence appropriateness. *See* United States v. Ballard, 20 M.J. 282 (C.M.A. 1985). In Ballard the Court stated,

> We are, of course, well aware that the experienced and professional military lawyers who find themselves appointed as trial judges and judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial. Indeed, by the time they receive such assignments, they can scarcely help it; and we have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes sentence or a court of military review assesses for

[3] While Article 66 has changed slightly with the Military Justice Act of 2016, there is not a material difference. The current version of Article 66, UCMJ, states the CCAs "may only act with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 ed.). The version that predated it stated, "Courts if Criminal Appeals may act only with respect to the finding and sentence as approved by the convening authority." Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016 ed.).

> sentence appropriateness. Thus, to hold that a trial or appellate court may not consider the sentences in other cases would be folly. We simply hold that these courts cannot be *required* to consider such other sentences. Thus, if a court concludes that further edification in the area of sentence averages is unnecessary, we will respect that judgment.

Id. at 286. (emphasis in original).

The practice of determining the appropriateness of an accused's sentence with reference and comparison to sentences in other cases was first recognized as an exception by the CCAs, rather than by this Court or its predecessor, where there were highly disparate sentences in closely related cases. United States v. Olinger, 12 M.J. 458, 460 (C.M.A. 1982) (related citations omitted). This Court accepted the practice as "well settled" in Ballard:

> It is well settled that, except in those rare instances in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases, such as those of accomplices, sentence appropriateness should be determined without reference to or comparison [*sic*] with the sentences received by other offenders.

Ballard, 20 M.J. at 282 (emphasis added). This Court further found in United States v. Brock that the CCAs have the authority under Article 66, UCMJ, to make findings as to whether cases are closely related and to modify the sentences of co-conspirators or aiders or abettors. 46 M.J. 11, 13 (C.A.A.F 1997).

However proper it may be for the convening authority and the CCAs to consider sentence comparison as an *aspect* of sentence appropriateness, it is one of many aspects of that consideration. United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982). From the mere face of court-martial promulgating orders or similar documents, it is simply not possible to assess the multitude of aggravating and mitigating sentencing factors considered in the cases they represent. Ballard, 20 M.J. at 285.

In other contexts, this Court has staunchly disallowed consideration of extra-record materials for evaluating sentence appropriateness. This Court's predecessor declined to consider information which occurred months after the convening authority acted upon the sentence and forwarded the record of trial, because the Court did not consider it a part of the "record subject to review under Article 66 and [it] should not be considered with respect to the appropriateness of the sentence as approved by the convening authority." United States v. Fagnan, 12 U.S.C.M.A. 192, 193 (U.S.C.M.A. 1961). Article 66, UCMJ, review is expressly restricted by Congress to the "entire record" in assessing the appropriateness of the sentence, and CCAs should not go beyond the record of trial and related materials which were before the convening authority at the time of action. Id. at 194. The Court noted that it appeared Congress, "in conferring judicial character upon the boards of review, thought-fully sought to limit their charter of review to matters

reasonably connected to the proceedings already completed in the cause[,]" which was accomplished through limiting review of questions concerning the sentence to matters in the entire record. Id. Fagnan held a board of review (the predecessors of CCAs) must limit its consideration of information relating to the appropriateness of a sentence to matters included in the entire record. Id. at 195.

In United States v. Jessie, this Court found that three distinct lines of precedent governed whether a CCA may consider materials outside the record when reviewing a sentence under Article 66, UCMJ. 79 M.J. 437, 440 (C.A.A.F. 2020). The first line follows Fagnan in that CCAs may only consider what is in the record. Id. The second line follows Unites States v. Brennan and permits CCAs to supplement the record by accepting affidavits or ordering additional factfinding hearings when the CCAs decide issues that are raised by materials in the record but are not fully resolvable by those materials. Id. (*citing* 58 M.J. 351 (C.A.A.F. 2003)). The final line allows CCAs to consider materials outside the record for a limited class of issues – Article 55, UCMJ and Eighth Amendment claims– even though those issues are not raised by anything in the record. Id. (*citing* United States v. Erby, 54 M.J. 476, 477 (C.A.A.F. 2001)).

In Jessie, this Court found Fagnan "correctly interpreted the express requirement that a CCA base its review on the 'entire record' to mean that a CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire

record" restriction, under the grammar and punctuation of the second sentence of Article 66(c), UCMJ, applies equally whether the CCA is reviewing a sentence's correctness in law, reviewing a sentence's correctness in fact, or determining whether a sentence should be approved. Id.

Analysis

Based on the plain language of Articles 66(d), UCMJ, this Court should limit CCAs from considering extra-record results of other courts-martial that were not part of the record of trial at the time of docketing with the CCA. To allow consideration of extra-record results not part of the record of trial when the case was docketed with the CCA would be contrary to this Court's holdings in Fagnan and Jessie.

1. This Court should reaffirm the holdings of Fagnan and Jessie by prohibiting consideration of extra-record results of other courts-martial that were not part of the record of trial, because such a practice is contrary to the plain meaning of Article 66, UCMJ.

Allowing CCAs to consider extra-record results of courts-martial that were not part of the record of trial prior to the case being docketed at the CCA is contrary to the plain meaning of the Article 66, UCMJ, and this Court's precedent on sentence appropriateness review. First, Article 66, UCMJ makes no mention of comparison of a court-martial sentence with sentences in other cases. Further, Article 66, UCMJ, limits the CCA's ability to review a case for whether it is correct in law and fact and should be approved to "the entire record." Article

66(d), UCMJ. As early as 1961, this Court's predecessor held in Fagnan that CCA's must limit their "consideration of information relating to the *appropriateness* of sentence to matters included in the entire record." Fagnan, 12 U.S.C.M.A. at 195 (emphasis added). More recently, this Court held in Jessie that Fagnan's "entire record restriction" for what a CCA may review applies to the CCA's consideration of whether a sentence should be approved. Jessie, 79 M.J. at 444.

Given that sentence comparison is but one aspect of a sentence appropriateness review, it follows that it should be restricted by the holdings of Jessie and Fagnan to matters contained only within the record. Contrary to Appellant's argument, a comparison of Appellant's sentence with the sentences of other airmen mentioned during Appellant's court-martial does not fall into the Brennan category of precedent that would allow a CCA to review extra-record materials. (App. Br. *passim*). Appellant's record made no mention of the sentences received by the other airmen involved in some of her crimes. Thus, the comparative sentences received by any of these airmen is not an "issue[] that is raised by materials in the record." Jessie, 79 M.J. at 440.

In sum, reviewing extra-record results from courts-martial not in the record of trial at the time the case is docketed at the CCA is prohibited by the plain meaning of Article 66, UCMJ, and the holdings in Jessie and Fagnan.

2. This Court's precedent supports disallowing CCA's to review extra-record results of courts-martial attached after docketing at the CCA.

This Court has never specifically held that a CCA may consider extra-record materials in conducting sentence appropriateness review, yet it has tacitly endorsed the practice. Historically, the practice of determining the appropriateness of an accused's sentence with reference and comparison to sentences in other cases was begun by the CCAs, rather than through precedent set by this Court. *See* Olinger, 12 M.J. at 460. In Olinger, this Court noted that generally "the appropriateness of an accused's sentence is to be determined without reference or comparison to sentences on other cases," but noted the CCAs recognized an exception when highly disparate sentences occurred in closely related cases. Id. Even though this Court accepted the practice as "well settled" in Ballard, the Court never ruled on the specified issue of whether extra-record materials from courts-martial attached after the primary case has been docketed can be considered during an Article 66, UCMJ, review by the CCA. Ballard, 20 M.J. at 282. Appellant concedes this point in her brief. (App. Br. at 17.) Therefore, this is a question of first impression before this Court.

Appellant relies heavily on Brock to argue that this Court has never suggested a temporal boundary on the cases a CCA considers when exercising its sentence comparison authority. (App. Br. at 15.) However, the Court in Brock did so in the context of the CCA taking judicial notice of records the appellant sought

to have them review, not through attaching materials to the record. Furthermore, since the decision in Brock, this Court decided Jessie, which affirmed the correct standard to apply for sentence appropriateness review is found in Fagnan. Jessie, 79 M.J. at 444. This Court expressly requires that a CCA base its review on the "entire record," which means the CCA cannot consider matters outside the record. Id. In Fagnan, this Court held that the words "entire record" in Article 66(c), UCMJ, included the record of trial and allied papers. 12 U.S.C.M.A. at 194. As analyzed above, because a court-martial result not attached to the record until docketing at the CCA necessarily is not contained in materials in the record, Brennan does not apply.

However, should this Court be persuaded by Appellant's argument that a constellation of cases gave rise to precedent on this issue, this Court applies the following factors in evaluating the application of *stare decisis:* "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018) (*citing* United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018)) (internal quotation marks omitted) (citation omitted).

Here, the factors weigh in favor of prohibiting CCAs from considering extra-record results from courts-martial that are not part of the record of trial prior

to the case being docketed at the CCA. This Court's prior decisions that seemingly allow for consideration of extra-record materials by the CCAs in evaluating sentence appropriateness are both poorly reasoned and unworkable.

a. Decisions that seemingly allow for consideration of extra-record materials by the CCAs are poorly reasoned because they are contrary to the plain meaning of Article 66, UCMJ, and erroneously developed a "requirement" that certain sentences be compared.

This Court's prior decisions on sentence comparison are poorly reasoned because they are contrary to the plain meaning of Article 66, UCMJ, and this Court's precedent in Fagnan, as analyzed above. This line of caselaw started inauspiciously in Ballard in 1985, where this Court's predecessor understandably recognized that military trial and appellate judges will rely on their prior experiences when coming to decisions on the appropriateness of a sentence:

> We are, of course, well aware that the experienced and professional military lawyers who find themselves appointed as trial judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial. Indeed, by the time they receive such assignments, they can scarcely help it; and we have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes or a court of military review assesses for sentence appropriateness. Thus, to hold that a trial or appellate court may not consider the sentences in other cases would be folly.

20 M.J. at 286. Nonetheless, the CMA held that the CCA's "cannot be *required* to consider such other sentences." Id. (emphasis in original).

However, by the time of its 1999 decision in Lacy, this Court seemed to be recognizing a *requirement* for the CCAs to compare sentences in closely related cases:

> Recognizing that the sentence review function of the Courts of Criminal Appeals is highly discretionary, we have not required those tribunals to engage in sentence comparison with specific cases "except in those rare instances in which sentenced appropriateness can be fairly determined only by reference to disparate sentence adjudged in closely related cases."

Lacy, 50 M.J. at 288 (*citing* Ballard, 20 M.J. at 283; Brock, 46 M.J. at 11[4]).

Yet, it is unclear where such a requirement derived from. Presumably, the Lacy court was referring to the passage in Ballard that reads: "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases, such as those of accomplices, sentence appropriateness should be determined without reference to or comparison with the sentences received by other offenders." 20 M.J. at 283. That particular Ballard passage, in turn, cited to Snelling, 14 M.J. 267 (C.M.A.1982) and Olinger, 12 M.J. at 460. But neither Snelling nor Olinger says that CCAs *must* conduct sentence comparisons for closely related cases. Olinger

[4] In Brock, this Court held that the CCA erred by refusing to take judicial notice of the sentence of another court-martial to determine if the case was closely related to the appellant's and if the sentences were highly disparate. 46 M.J. at 13. This Court once again based its holding on Ballard.

stated: "Generally, the appropriateness of an accused's sentence is to be determined without reference or comparison to sentences in other cases." But the CMA observed that "*intermediate courts* have recognized an exception to this general rule, however, when there are highly disparate sentences in closely related cases." 12 M.J. at 460 (emphasis added). While the CMA did not criticize the intermediate courts' practice, it also did not opine that the practice was required as part of Article 66, UCMJ, review. Thus, it is uncertain how comparing sentences in closely related cases became a "requirement" recognized by this Court in Lacy, especially since such a requirement has no basis whatsoever in the text of Article 66, UCMJ.

Not only is the notion that CCAs *must* conduct sentence comparison in closely related case poorly reasoned, but the concept that CCAs must or can compare sentences by admitting extra-record materials is poorly reasoned as well. Again, Article 66, UCMJ, makes no mention of CCAs comparing other court-martial sentences as part of sentence appropriateness review. If Article 66, UCMJ, says nothing about sentence comparisons and commands that CCAs are to review sentence appropriateness only "on the basis of the entire record," then the practice of admitting extra-record materials to conduct sentence comparisons has no basis at all in the UCMJ. CCAs "are courts of limited jurisdiction, defined entirely be statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). They "must

exercise their jurisdiction in strict compliance with authorizing statutes." Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013). In order to ensure CCAs exercise their jurisdiction in accordance with the plain language of Article 66, UCMJ, this Court should hold that CCAs cannot consider extra-record results of other courts-martial during Article 66, UCMJ, review.

Appellant argues that "Lacy and other broadly sweeping sentence comparison cases" are not poorly reasoned because a CCA necessarily can consider court-martial sentences, even if the actual sentences arise later, in order to fulfill its Article 66, UCMJ, responsibilities. (App. Br. at 20.) Appellant's argument is undone by the fact that sentence comparison is only one aspect of a sentence appropriateness review. For her argument to have merit, it would require this Court to find every sentence appropriateness review that does not use sentence comparison inadequate to meet the intent of Article 66, UCMJ.

b. The practice of sentence comparison is unworkable because requests cannot be easily adjudicated without attachment of the entire record from the comparison case.

In addition to being poorly reasoned, the practice seemingly endorsed by this Court's prior decisions is also unworkable. Requests for sentence comparison cannot be easily adjudicated based on the entry of judgment in a comparison case. For example, in the present case, the entry of judgement provides no information on CM's service record, evidence in mitigation or extenuation, plea agreements in

place or not, whether CM expressed remorse during an unsworn statement, nor any other information that would shed light on questions of whether the cases are "closely related," whether the sentences are "highly disparate," or – if there is a highly disparate sentence among closely related cases – whether there is a "rational basis." This Court noted in Ballard, "[f]rom the mere face of court-martial promulgating orders or similar documents, it is simply not possible to assess the multitude of aggravating and mitigating sentencing factors considered in the cases they represent." Id. at 285; Similarly, in United States v. Capps, 1 M.J. 1184 (A.F.C.M.R. 1976), the CCA obtained the full record of trial in the companion case, which was decided the day before appellant's, without objection by counsel, because the entire record was necessary for them to answer the questions of whether the cases were closely related, the sentences highly disparate, and whether there was a rational basis for any disparity.

Given the enumerable factors during a trial that might justify a certain sentence, CCAs cannot truly conduct a fair evaluation of two sentences without comparing the entire records of trial from both cases.[5] But that means CCAs would need to attach a completely separate record of trial – and in some cases,

[5] Indeed, if an appellant meets his burden under Lacy to show that certain cases are closely related and the sentences are highly disparate, and the burden shifts to the government to show a rational basis for the disparity, the government might only be able to meet its burden by attaching the entire record of trial from the other case.

multiple other separate records of trial – to an appellant's own record. Not only would this be well outside of the Article 66, UCMJ, mandate for CCAs to determine sentence appropriateness "on the basis of the entire record," it would also be a heavy burden on the CCAs. The reality of needing to review an entirely separate sentence to make an appropriate comparison makes sentence comparison unworkable for CCAs, despite its twenty-three year history since Lacy.

c. A significant intervening event occurred when this Court decided Jessie and reaffirmed the holding in Fagnan.

With regard to "any intervening events" that occurred, a fairly significant intervening event occurred when this Court decided Jessie. In doing so, this Court reaffirmed the holding in Fagnan that was eroded by CCA practice and this Court's decisions seemingly requiring CCAs to consider extra-record materials. This Court decided Fagnan in 1961, but then recognized the CCAs' practice of sentence comparison as a settled matter when it decided Ballard in 1985. Both Brock and Lacy were decided over ten years later, in 1997 and 1999, respectively. In Jessie, this Court conducted a thorough analysis of when the inclusion of extra-record materials is appropriate for a CCAs consideration during Article 66, UCMJ, review. Though this Court recognized an exception for issues raised, but not resolved, by the record and for Article 55, UCMJ, and Eighth Amendment cruel and unusual punishment claims, it did not recognize such an exemption for sentence comparison. Jessie, 79 M.J. at 444-45. The Jessie decision represented a

shift in this Court's jurisprudence regarding the scope of Article 66 review – with a renewed emphasis on confining review to the plain language of Article 66, UCMJ. And Jessie likewise represented a significant intervening event that should give this Court reason to reconsider its precedents concerning sentence comparison.

d. The reasonable expectations of servicemembers will not be upset by following the plain language of Article 66, UCMJ.

As for the reasonable expectations of servicemembers, the plain meaning of Article 66, UCMJ, assures them that a CCA "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, *on the basis of the entire record*, should be approved." Article 66(d), UCMJ. Through the plain language of Article 66, UCMJ, servicemembers are assured they will only receive sentences that "should be approved;" however, they are also told the determination will be made "on the basis of the entire record." Ballard also allows military judges at the trial and appellate levels to use their accumulated knowledge to ensure a particular sentence is not inappropriately severe. The United States does not seek to disturb that portion of Ballard's holding. The judges of the CCAs should be able to use their general knowledge of sentences typically received within the military justice system – accumulated through years of experience – to help determine whether an individual sentence is inappropriately severe. As this Court has recognized, to try to prevent appellate judges from using this knowledge would be folly. But

appellate judges should not attempt a direct comparison between two servicemembers' sentences – especially based on extra-record materials submitted after docketing with the CCA. Judge Ferguson aptly observed in his opinion concurring in the result in United States v. Judd, that the "inclusion of the phrase 'on the basis of the entire record'" in Article 66, UCMJ, "has some meaning," and therefore, "mathematical calculation is not the type of [sentence] uniformity which Congress deemed desirable." 28 C.M.R. 388, 394 (U.S.C.M.A. 1960) (Ferguson, J., concurring in result). Instead, Congress envisioned that appellate authorities "would utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding the accused's delict, his sentence was appropriate. In short, it was hoped to attain *relative* uniformity rather than an arithmetically averaged sentence." Id. (emphasis in original). So long as servicemembers know that CCA judges can still use their accumulated experience in judging sentence appropriateness, there should not be serious concerns about a change in this Court's jurisprudence.

e. Public confidence will not be undermined by abandoning the practice of sentence comparison based on extra-record material, because appellants are still ensured a sentence appropriateness review.

Abandoning the practice of sentence comparison based on extra-record material will also not undermine public confidence in the law, because each servicemember is still afforded a sentence appropriateness review. That review

will be based on the record and the weight and breadth of the knowledge and experience of the military attorneys assigned as appellate judges to the CCAs. Appellant's argument that the fall of "post-docketing sentence comparison" will call into question the validity of other issues raised for the first time on appeal such as ineffective assistance of counsel relies on a faulty "slippery slope" analysis. (App. Br. 26.) First, Jessie specifically preserves attachment of matters for the resolution of ineffective assistance of counsel claims. Second, since sentence comparison is not governed by the Brennan line of precedent; its disposition has no bearing on ineffective assistance of counsel claims or other similar claims already raised by the record. Therefore, public confidence related to those matters will not be impacted by this Court's decision to limit CCA review of extra-record sentences of courts-martial attached to the record after the case is docketed at the CCA.

In conclusion, the practice of considering extra-record materials in conducting sentence comparisons should be discontinued because it is contrary to the plain language of Article 66, UCMJ. This Court's more recent precedent in Jessie also does not support the continuation of this practice. Even if this Court applies the principles of *stare decisis*, those principles weigh in favor of disallowing extra-record submissions of other court-martial results for purposes of sentence comparison.

II.

THE AIR FORCE COURT CORRECTLY APPLIED *UNITED STATES v. LACY,* 50 M.J. 286 (C.A.A.F. 1999) WHEN IT HELD THAT CM'S AND APPELLANT'S CASES WERE NOT CLOSELY RELATED CASES WHOSE SENTENCES REQUIRED COMPARISON.

Standard of Review

This Court reviews a CCA's sentence appropriateness determination for abuse of discretion. Gay, 75 M.J. at 267 (*citing* United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2010)).

Law

This section incorporates the law cited previously under Issue I and supplements with the following.

At the CCA, Appellant bore the burden of demonstrating that any cited cases are "closely related" to her case and that the sentences were "highly disparate." Lacy, 50 M.J. at 288. If Appellant met her burden, the burden shifts to the Government to show there was a rational basis for the disparity. Id.

This Court limited its review of the decision by the CCA to three questions of law under Lacy: (1) whether the cases are "closely related"; (2) whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases. Id. As

examples of closely related cases, Lacy gives "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between servicemembers whose sentences are sought to be compared." Id.

Under current precedent, CCAs are required to engage in sentence comparison only "in those rare instances in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases." Id. (*citing* Ballard, 20 M.J. at 283 (emphasis added).

This Court in Wacha found the CCA did not abuse its discretion nor cause a miscarriage of justice in its Article 66, UCMJ, analysis when sentence comparison was but one aspect of the sentence appropriateness equation. 55 M.J. 266, 268 (C.A.A.AF. 2001). The Court in Wacha assumed *arguendo* that the lower court applied Lacy in an unduly restrictive manner, which required the Court to test the CCA's finding, that appellant's sentence was relatively uniform and appropriate, for abuse of discretion. Id. The Court was convinced by a fair reading of the CCA's opinion that the judges went beyond a mere comparison to the requested sentence when determining that appellant's sentence was appropriate and relatively uniform. Id.

> Finding that sentence comparison is but one aspect of the sentence appropriateness equation, the court found appellant's sentence was appropriate for the crimes he had committed, and the fact that Pvt Rice received less

> punishment [did] not render the appellant's sentence a miscarriage of justice. Id. (*citing* United States v. Durant, 55 M.J. 258 (C.A.A.F. 2001); and United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)).

As for what it means for cases to be "closely related," in Lacy, this Court agreed with the CCA that the cases under review were "closely related" where appellant and two other Marines engaged in the same course of conduct with the same victim in each other's presence. Id. at 289. In Wacha, this Court noted the fact the appellant was the supplier of the marijuana for the defendant in the comparison case, did not by itself make cases closely related. Wacha, 55 M.J. at 268. The charges and specifications in Wacha reflected that only four of appellant's 16 drug offenses involved the accused from the comparison case. Id.

Analysis

The CCA did not abuse its discretion when it found Appellant's and CM's cases were not closely related, because its decision was within the range of reasonable choices based on the applicable facts and law. *Cf.* United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2017). The CCA's holding that Appellant's and CM's cases are not closely related within the standard set forth by Lacy is not an abuse of discretion, because they were not coactors involved in a common crime for *all* convicted offenses, nor were CM and Appellant involved in a common or parallel scheme for *all* convicted offenses, nor does there exist any other direct nexus between the servicemembers for *all* convicted offenses.

1. The CCA did not abuse its discretion when it found Appellant's and CM's cases were not closely related.

Appellant was convicted not only for using LSD and cocaine with CM, but for separately fraudulently enlisting in the Air Force and making a false official statement to military investigators. She committed these two offenses without the involvement of CM. The CCA found that in the drug use specifications the fact patterns were sufficiently connected that CM and Appellant could be said to be involved in a common or parallel scheme. Due to the fact that CM was entirely unconnected to two of the other offenses Appellant committed, the CCA determined that they were not closely related for the purposes of sentence comparison. They made this determination based solely on the record of Appellant's case and the entry of judgment from CM's case.

Appellant contends that she and CM were coactors because CM procured the LSD and helped procure the cocaine Appellant used. A direct nexus between Appellant and CM for the drug use specifications does not alone make the cases closely related. Even if discovery of the drug use offenses instigated the investigation into Appellant and CM, which led to the other charges, Appellant still committed those other offenses independently and separately.

There was no coacting, common scheme or plan, nor direct nexus between CM and Appellant for the fraudulent enlistment and false official statement specifications, as indicated by the stipulation of fact in the case. Appellant

fraudulently enlisted years before meeting CM. Furthermore, there is no evidence either engaged in a common plan to lie to investigators.

The CCA did not abuse its discretion, because it operated within the range of reasonable choices based on the applicable facts and law. AFCCA employed similar rationale – albeit on a smaller scale – to Wacha, where this Court found the cases were not "closely related." when only four of the sixteen specifications overlapped. Wacha, 55 M.J. at 268.

Appellant cites United States v. Blow to illustrate her point that this Court does not require identical convictions for cases to qualify as closely related for sentence comparison. 2022 CCA LEXIS 495 (A.F. Ct. Crim. App., August 23, 2022) (*citing* Brock, 46 M.J. at 11-13). However, Blow employed an erroneous understanding of this Court's holding in Brock to come to its decision. In Brock, this Court never reached the question of whether the cases were closely related because it had no information attached to the record to use for a sentence comparison. Brock, 46 M.J. at 13. Once remanded, the CCA in Brock found after examining the appellant's stipulation of fact, both convictions, and sentencing evidence: "There is no evidence that the appellant's case and Airman Thomas' case are closely related; therefore, comparison of the sentences in the two cases constitutes the classic 'apples-and-oranges' irrelevance." Brock, 1997 CCA LEXIS 249 at *5. AFCCA based this finding on the determination that "any

evidence of Airman Thomas' involvement with the appellant is limited to comments in the stipulation of fact, that Thomas was a co-actor in some, but not all, of appellant's offenses." Id. The CCA employed the same rationale in the current case.

In this case, Appellant did not supply AFCCA with the information necessary to fully conduct this comparison either: Appellant offers only the results of the courts-martial, omitting key documents necessary to evaluate how the sentencing authority may have arrived at the outcome, such as plea agreements, stipulations of fact, and evidence in mitigation and extenuation that the sentencing authority may have considered. In contrast, in evaluating requests for sentence comparison, the Air Force Court of Military Review has previously reviewed the entire record of trial of the allegedly closely related case to determine if the cases are indeed closely related. *See*, *e.g.*, Capps, 1 M.J. 1184 ("Though, in view of the sentence, the record of trial in the companion case is not before us for review, we have, with no objection by counsel for either side, obtained it in order to make a close comparison of relevant circumstances.") (*citing* Article 66, UCMJ). Here, using solely the record of trial and the materials provided by Appellant, AFCCA found the cases were not closely related. It was Appellant's burden under Lacy to establish her case was closely related to CM's, which she failed to do.

2. Even if the CCA misapplied Lacy in determining the cases were not closely related, the Court still compared Appellant's case to CM's case and decided no relief was warranted.

Assuming AFCCA erred by finding Appellant and CM's cases were not closely related, Appellant was not prejudiced by that specific error (the subject of the granted issues), because AFCCA considered CM's sentence as part of its sentence appropriateness review anyway. After finding the cases were not closely related, the CCA stated:

> we find Appellant has identified a case that should trigger this court's sentence appropriateness review by reference to a sentence adjudged in another case. We reach this conclusion even though we are not convinced Appellant met her burden to show her case and CM's case are closely related under Lacy . . .Therefore, we will consider the result of CM's court-martial as part of our determination whether Appellant's sentence is "both relatively uniform and appropriate."

(JA at 16.) (citing Wacha, 55 M.J. at 268).

The CCA ultimately conducted the sentence comparison Appellant requested, and its decision to deny relief is entitled to significant deference. And since, in any event, "sentence comparison is but one aspect of the sentence appropriateness equation," Wacha, at 55 M.J. at 268, this Court should decline to grant Appellant any relief.

3. Even under a full Lacy analysis, Appellant is not entitled to relief because her sentence was not highly disparate with CM's.

Appellant did not meet her burden to show that the sentences were highly disparate. Appellant asks the Court to find Appellant's sentence was inappropriate because she received confinement and a punitive discharge where CM did not. However, that alone does not create a highly disparate sentence. Given the individualized nature of sentencing, there will always be some variation between sentences. Durant, 55 M.J. at 261. This Court reasons that any disparity between adjudged sentences should be evaluated in relation to their maximum punishment. Lacy, 50 M.J. at 289; *see also* United States v. Anderson, 67 M.J. 703, 707 (C.A.A.F. 2009). A sentence to a punitive discharge in one case, but not in another, does not necessarily constitute a high disparity. *See* United States v. Fee, 50 M.J. 290 (C.A.A.F. 1999). Based on the forum of a special court-martial, both Appellant and CM were exposed to a maximum confinement of one year and a bad conduct discharge. In Fee, this Court found the sentences *not* highly disparate when the appellant received thirty-six months of confinement and a dishonorable discharge, and the co-actor fifteen months confinement and bad-conduct discharge. Id.

Relative to the maximum punishments available in Appellant's and CM's cases, the sentence each received was relatively low when compared to the potential maximums for the forum. For Appellant, she received less than a third of

the confinement available at a special court-martial while receiving a bad conduct discharge, a punitive discharge her plea agreement did not protect against. Appellant made the knowing choice to enter into a plea agreement that left the door open for her to receive a punitive discharge and received the benefit of that plea agreement in limitations on her confinement terms. (JA at 76-79.) Since both Appellant and CM received punishments well below the maximum available, their sentences are not highly disparate.

4. Because Appellant did not meet her burden of showing her case was "closely related" to CM's, the burden correctly did not shift to the United States to provide any rational basis for the alleged disparity.

At the CCA, Appellant bore the burden of demonstrating that any cited cases are "closely related" to her case and that the sentences were "highly disparate." Lacy, 50 M.J. at 288. If Appellant had met her burden, the burden would have shifted to the Government to show there was a rational basis for the disparity. Id. However, Appellant failed to meet her burden to show that her case was closely related to CM's. As stated above, the CCA did not abuse its discretion when coming to the conclusion that Appellant's case was not closely related to CM's. Therefore, the burden correctly never shifted to the United States to show there was a rational basis for the alleged disparity.

However, had the burden shifted to the United States, there is a rational basis for the alleged disparity – CM was sentenced by members, and Appellant by a

military judge. This difference is so fundamental that this Court may decide this issue on this basis alone. The procedural history of a case will inevitably impact the sentence a court-martial will adjudge, and it is a rational basis for sentence disparity. Durant, 55 M.J. at 263 (Sullivan, J., concurring) ("This optional procedure [election by a court-martial of members] may lead to court-martial sentences in closely related cases which are not the same[.]"). The sentence adjudged by the military judge is not rendered inappropriate simply because someone else gambled with members and received a surprisingly low sentence – hard labor without confinement for three months, reduction in grade to E-1, and forfeiture of $500 pay per month for three months. (JA at 189.)

5. The CCA conducted a full and complete and individualized sentence appropriateness review of Appellant's case and found based on the record of trial her sentence was appropriate.

Even if the Court finds the CCA misapplied Lacy when conducting the comparison requested by Appellant and concludes the cases were closely related and the sentences highly disparate without a rational basis, this Court should still affirm Appellant's sentence. Following the test in Wacha, and assuming *arguendo* that the CCA applied Lacy in an unduly restrictive manner, this Court must test the CCA's finding that Appellant's sentence was relatively uniform and appropriate for an abuse of discretion.

The CCA found, "Appellant's sentence is not inappropriate based on the record below and also with regard to sentences adjudge in other cases when that information was brought to this Court's attention on appeal." (JA at 18.) As in Wacha, the CCA conducted a more extensive sentence appropriateness review than just sentence comparison and came to the conclusion that Appellant received an appropriate sentence. Given all the circumstances in this case, Appellant's sentence of a bad-conduct discharge was just. Likely in recognition of the appropriateness of a punitive discharge, Appellant did not preclude the possibility of a bad-conduct discharge in her plea agreement, and she did not request that the convening authority set aside the punitive discharge in her clemency submission. Furthermore, outside of her sentence comparison argument, Appellant does not contend that her sentence is otherwise inappropriate.

Appellant committed four separate offenses and in doing so exposed herself to seventeen years of confinement and a dishonorable discharge. *See* MCM 2019, Appendix 12. But because of the limitations at a special court-martial her potential sentence was limited to twelve months of confinement and a bad conduct discharge. She gained the benefit of the plea agreement – limiting her maximum exposure to five months confinement and a bad conduct discharge. Appellant fully understood that benefit at trial. The sentence she received – 110 days confinement and bad conduct discharge – was entirely appropriate for those offenses.

Furthermore, with each offense, Appellant attempted to mitigate her own culpability during her providence inquiry when the military judge questioned her about the circumstances surrounding her crimes. In particular, as the lower court credited, her Air Force recruiter testified Appellant never told him about her drug use and he never encouraged her to falsify her enlistment paperwork. (JA at 151-2.) Given the lack of integrity involved Appellant's offenses since before she entered the Air Force, the aggravating fact she encouraged other Airmen to engage in illegal activity, and testimony contradicting her self-serving sworn statements in her providence inquiry, the sentence Appellant received was entirely appropriate.

For these reasons, the CCA did not abuse its discretion or engage in a miscarriage of justice when it found Appellant's sentence appropriate. Therefore, there is no reason for this Court to remand this case to the CCA for further proceedings.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 January 2023.

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/s/

OLIVIA B. HOFF

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 11 January 2023

APPENDIX

Cited Unpublished Opinions

United States v. Brock

United States Air Force Court of Criminal Appeals

June 27, 1997, Decided

ACM 31301 (f rev)

Reporter
1997 CCA LEXIS 249 *; 1997 WL 392628

UNITED STATES v. Airman Basic ADAM J. BROCK, United States Air Force

Prior History: **[*1]** Sentence adjudged 29 June 1994 by GCM convened at Royal Air Force Chicksands, United Kingdom. Military Judge: Edward M. Starr (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 2 years and 6 months, and forfeiture of all pay and allowances.

Disposition: AFFIRMED.

Core Terms

sentence, marijuana, hashish, Court-Martial, occasions, offenses, stipulation of facts, unsworn statement, use of marijuana, closely related, find guilty, distributing, involvement, reconsider, documents, cases, drugs

Counsel: Appellate Counsel for Appellant: Lieutenant Colonel Kim L. Sheffield and Major Ormond R. Fodrea.

Appellate Counsel for the United States: Colonel Theodore J. Fink, Lieutenant Colonel Michael J. Breslin, and Captain Libby A. Brown.

Judges: Before HEIMBURG, GAMBOA and SENANDER, Appellate Military Judges

Opinion

UPON FURTHER REVIEW

PER CURIAM:

We again visit the case of Airman Basic Adam J. Brock. In our earlier opinion, dated 8 February 1996, we upheld the approved findings and sentence. The Court of Appeals for the Armed Forces held that we erred in not "admitting" evidence regarding another individual's (Airman Thomas's) court-martial sentence. *United States v. Brock, 46 M.J. 11 (1997)*. Our superior court remanded the case to us with instructions to reconsider our ruling in order to determine (1) whether the appellant's case was closely related to the other case and, if so, (2) whether the **[*2]** sentences were highly disparate. *Id. at 13*. *See United States v. Ballard, 20 M.J. 282 (C.M.A. 1985)*; *United States v. Olinger, 12 M.J. 458 (C.M.A. 1982)*. After accepting evidence regarding the Thomas case, we answer the first question in the negative--rendering moot the second question.

The documents at issue are General Court-Martial Order (GCMO) No. 17, Headquarters Third Air Force, dated 4 August 1994, promulgating the findings and sentence in the case of *United States v. Airman First Class James E. Thomas, Jr.*; the Transmittal of Court-Martial Charges (AF Form 65), dated 15 February 1994, in the *Thomas* case; and a photocopy of a map of the Bedford-Cambridge area of England. We reconsider our previous denial of this evidence, and hereby accept GCMO No. 17 and the AF Form 65. Those documents tell us that Airman Thomas was a below-average performer who was found guilty of divers uses of LSD; one distribution of LSD; one use of marijuana; one distribution of marijuana; divers uses of marijuana in the Netherlands; and one wrongful possession of hashish. His approved sentence was a bad-conduct discharge, confinement for 13 months, forfeiture of $ 500.00 pay per month **[*3]** for 13 months, and reduction to airman basic.

The appellant had been punished twice under Article 15, UCMJ, had a suspended nonjudicial punishment vacated, received two letters of counselling and a letter of reprimand. He was found guilty of using LSD on divers occasions; distributing marijuana on divers occasions; using marijuana on divers occasions; and distributing amphetamines. The details of the appellant's offenses are "fleshed out" in a stipulation of fact, Prosecution Exhibit 1. The appellant sold marijuana and

hashish to an individual he thought was a British national, at a substantial profit (# 150); used LSD with other airmen and British nationals; sold two bags of hashish, each containing 1/8 ounce, to another airman; and made "marijuana brownies" at the home of a British national. In one eight-day period, the appellant used marijuana and/or hashish every day. He provided a urine sample pursuant to a unit inspection, which tested positive for tetrahydrocannabinol, the active ingredient of marijuana.

The appellant did not mention Airman Thomas during his providence inquiry. The only indication that there might have been some basis to "compare" the two cases, was a statement **[*4]** in the appellant's unsworn statement that Airman Thomas was the individual who introduced him to drugs. However, an unsworn statement is not evidence. R.C.M. 1001(c)(2)(C). Any *evidence* of Airman Thomas' involvement with the appellant is limited to comments in the stipulation of fact, that Thomas was a co-actor in some, but not all, of the appellant's offenses. From review of GCMO No. 17 and the AF Form 65 in the *Thomas* case, "it is simply not possible to assess the multitude of aggravating and mitigating sentencing factors considered" in that case. *Ballard, 20 M.J. at 285*. There is no evidence that the appellant's case and Airman Thomas' case are closely related; therefore, comparison of the sentences in the two cases constitutes the classic "apples-and-oranges" irrelevance.

Sentence appropriateness should be judged by "individualized consideration" of the particular accused "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)*. Based on the entire record, we are confident that the appellant received the sentence he deserved for the crimes he committed: very extensive **[*5]** and serious involvement with illegal drugs, including the sale of marijuana for profit. In light of the appellant's prior abysmal military service record and his offenses, we find his sentence entirely appropriate. Article 66(c), UCMJ; *United States v. Healy, 26 M.J. 394 (C.M.A. 1988)*.

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

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